

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF MCCOOK LAKE)
RECREATION AREA ASSOCIATION'S)
PETITION FOR DECLARATORY)
RULING REGARDING)
APPROPRIATIVE PERMITS AND)
SHORELINE ALTERATION)

**MOTION TO STRIKE DAKOTA
BAY, LLC'S RESISTANCE, JOINDER,
EXHIBITS, AND APPEARANCES**

COMES NOW, Petitioner McCook Lake Recreation Area Association ("Association"), by and through its attorney, John M. Hines, and in support of its Motion to Strike, states as follows:

1. The Association filed a Petition for Declaratory Ruling ("Petition") with the Water Management Board on or about March 10, 2023.

2. Dakota Bay, LLC was personally served a copy of the Petition, on its member/manager Michael Chicoine, on March 10, 2023. Mr. Chicoine was also personally served a copy of the Petition in his individual capacity on February 28, 2023.

3. On June 15, 2023, as instructed by the Chief Engineer, a Public Notice was published in the *Yankton Press & Dakotan* and *Elk Point Leader Courier*, ("Notice") giving notice of the Association's Petition, and informing the public of the scheduled hearing on the Petition.

4. The Notice also informed the public that "[a] petition to opposing the declaratory ruling shall be filed on a form provided by the Chief Engineer."

5. The Notice further informed the public that "[a] petition filed by an interested person must be filed by June 30, 2023."

6. On June 22, 2023, the Chief Engineer, by and through Assistant Attorney General Ann Mines Bailey, filed a petition opposing the declaratory ruling on the form provided by the Chief Engineer.

7. Prior to June 30, 2023, Dakota Bay, LLC (“Dakota Bay”) did not, and still has not, filed a petition opposing the declaratory ruling on the form provided by the Chief Engineer.

8. Because Dakota Bay did not submit a petition opposing the declaratory ruling prior to June 30, 2023, Dakota Bay, LLC is not a party to the declaratory ruling.

9. On July 21, 2023, attorneys for Dakota Bay submitted several documents to the Water Management Board, namely: “Resistance to Petition to [sic] Declaratory Ruling Filed by the McCook Lake Recreation Area Association and Joinder to the Chief Engineer’s Prehearing Brief”; “Notices of Appearance” [for the declaratory ruling]; and provided an “Exhibit 400”.

10. Dakota Bay’s attempt to intervene in this proceeding is untimely, particularly since it had notice of the Association’s Petition no less than 112 days prior to the June 30, 2023 deadline. *See*, SDCL § 1-26-17.1 (“A person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by intervention, if timely application therefor is made.”)

11. Dakota Bay’s untimely intervention prejudices the Association because the Association has just 12 days from the date it received the filings to prepare any arguments against Dakota Bay. Additionally, because Dakota Bay, LLC did not use the form provided by the Chief Engineer, the Association can only speculate what “unique injury” Dakota Bay claims it will suffer as a result of the declaratory ruling.

12. Dakota Bay's untimely intervention further prejudices the Association because the deadline for the exchange of exhibits has already passed.

13. Because Dakota Bay is not a party, and its attempted intervention is untimely, its filings are improper, immaterial, and impertinent, and should be stricken by the Water Management Board ("Board"). SDCL § 1-26-19(1) ("Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded.")

14. Furthermore, the Board should clarify that Dakota Bay is not permitted to offer argument or evidence during the declaratory ruling hearing scheduled for August 2, 2023 at 10:00 a.m.

WHEREFORE, the Association respectfully requests the Board grant its Motion to Strike and for such other relief as the Board deems equitable and just.

Dated this 25th day of July 2023.

CRARY, HUFF, RINGGENBERG, HARTNETT &
STORM, P.C.

BY:



John M. Hines
711 Sioux Point Road, Suite 200
Dakota Dunes, SD 57049
Phone: (712) 224-7550
Fax: (605) 232-8931
jhines@craryhuff.com

Certificate of Service

The undersigned hereby certifies that on this 25th day of July, 2023 a true and correct copy of the foregoing *Motion to Strike* was served by U.S. Mail, first-class, postage prepaid, upon the following:

Dakota Bay, LLC
c/o Dean Fankhauser
613 Pierce Street
Sioux City, IA 51101

Dakota Bay, LLC
c/o Stacy Hegge
111 West Capitol Ave, Suite 230
Pierre, SD 57501

Ann F. Mines Bailey
Assistant Attorney General
Counsel for Water Rights Program, DANR
1302 East Highway 14, Suite 1
Pierre, SD 57501

Rodney Freeman, Prehearing Chairman
Water Management Board
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

David M. McVey
Assistant Attorney General
Counsel for Water Management Board
1302 East Highway 14, Suite 1
Pierre, SD 57501

Bill Larson, Chairman
Water Management Board
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

And on the same date, copies were emailed to:

Dean Fankhauser, dfankhauser@siouxcitylawyers.com
Stacy Hegge, shегge@gpna.com
David M. McVey, David.McVey@state.sd.us
Ann F. Mines Bailey, Ann.MinesBailey@state.sd.us



John M. Hines